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IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

PUERTO RICO MARITIME SHIPPING AUTHORITY,
Petitioner,

v.

FEDERAL MARITIME COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY OF PETITIONER TO BRIEFS IN OPPOSITION

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The Federal Maritime Commission ordered petitioner Puerto Rico Maritime Shipping Authority (PRMSA) to roll back its rates and refund millions of dollars to its customers on the finding that PRMSA would experience exorbitant profits without the roll back and refund. The agency reached that result by holding that "dramatic changes in world oil markets" (Pet. App., p. 77a) had rendered PRMSA's fuel forecast unreliable. The fuel forecast was made in November 1980, well prior to the effective date of the general rate increase at issue, as required by Commission regulations (F.R. Br., pp. 2-3).[1]

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[1] This designation, "F.R. Br.," refers to the Brief for the Federal Respondents in Opposition.

The record with respect to the fuel issue closed on April 23, 1981. No "dramatic changes" in the world oil market were shown on the record, nor could they have been, because such changes occurred well after the record on fuel had closed, and *after* the OPEC meeting of May 1981. Nor did the record contain post-forecast evidence relating to a less visible economic fact, the deepening recession and its special effect upon the Puerto Rican economy.

The Commission could have, but did not, either (1) affirm the Administrative Law Judge's (ALJ's) approval of PRMSA's rate increase based on the ALJ's holding that post-forecast events cannot be considered in evaluating rates predicated upon test year results; or (2) reopen the record to see whether use of the PRMSA forecast, given the post-record "dramatic changes" in fuel oil costs, would yield, *overall*, an unreasonable result. *Indiana & Mich. Mun. Distrib. Ass'n* v. *FERC*, 659 F.2d 1193 (D.C. Cir. 1981); *Villages of Chatham & Riverton, Ill.* v. *FERC*, 662 F.2d 23 (D.C. Cir. 1981); *Indiana Municipal Elec. Ass'n* v. *FERC*, 629 F.2d 480 (7th Cir. 1980). The Commission did neither. Instead it substituted, for PRMSA's fuel forecast, PRMSA's March fuel cost as a constant for the test year.

The Commission's decision thus raises a significant and general issue of law: whether, given the time strictures in the Intercoastal Shipping Act, § 3(b) (46 U.S.C. § 845(b)), whereby a carrier's "overall result" is not known until *after* the Commission's decision must issue, a forecast may be revised based on highly visible post-record events without affording the carrier an opportunity to show that when lesser-known post-record events are taken into account they balance out to an overall reasonable level of earnings.

The Court of Appeals finessed this issue by holding that there *was* evidence of record to support the Com-

mission's findings of "dramatic changes in world oil markets." The Court of Appeals' citations were to nine pages of magazine and newspaper articles printed in October, 1980 and January-February, 1981 which speculated on the future of world oil markets (Pet. App., pp. 243a-271a).[2] It cannot be argued that this constituted record evidence supporting the Commission's finding of "dramatic changes in world oil markets." Therefore, the federal respondents make their own finesse. The federal parties tell this Court that, by the absurd characterization of the October, 1980 and January-February, 1981 newspaper and magazine articles as constituting substantial evidence of record of "dramatic changes in world oil markets" since November, 1980, the Court of Appeals has converted this case from one raising a significant issue of law to one involving the most prosaic of issues, namely the substantial evidence rule (F.R. Br., p. 7).

If the federal parties are right, then this Court's intervention is urgently needed to once more balance the responsibilities of agency and court. The fact that this Court steps in to perform that task only rarely should not give Courts of Appeals the license to both misstate the evidentiary source of the Commission finding and then mischaracterize that evidence as "substantial." Such license especially merits this Court's attention where its effect is to exact a million dollar-plus price tag from a Commonwealth of Puerto Rico public corporation operating at a loss for the past several years.

1. This case does raise the highly important and indeed ubiquitous issue of whether post-forecast events can be utilized by an agency to modify test year results without showing that use of the forecast would achieve, overall, an unfair level of rates. Previous decisions of

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[2] Due to the enlarged typographical printing of Petitioner's Appendix here these newspaper clippings number more than 9 pages in the Petitioner's appendix.

the Court of Appeals for the District of Columbia and of the Seventh Circuit had determined that question in the negative. The Court of Appeals, by purporting to find that evidence in the record *was* the source of the Commission's "dramatic changes" finding, did not directly modify its previous holdings or openly contradict its sister circuit, but its statement that "[i]t may seem at first glance unfair to a carrier operating in a fast-breaking energy market to be forced to react and adjust to events up to the moment of decision" (Pet. App., p. 26a), coupled with its failure to require the Commission to afford the carrier an opportunity to show its *overall* earnings "up to the moment of decision," combine to make the decision below a precedent which directly conflicts with *Indiana & Mich. Mun. Distrib. Ass'n*, *supra*; *Villages of Chatham & Riverton, Ill.*, *supra*; *Indiana Municipal Elec. Ass'n*, *supra*, and with any rational scheme of rate regulation. For that reason alone, the decision merits review.

The federal respondents' statement, p. 8, n.6, that PRMSA cited no "record evidence coming to light" after its forecast that would alter the overall result is but one of many ironies in the case. Of course PRMSA did not, because the rules-of-the-road prohibited PRMSA from supplying new forecasts, since changing forecasts would defeat the opposition's due process rights to test PRMSA's numbers during the statutorily-abbreviated 60-day hearing. *However, the surrebuttal testimony of PRMSA's chief traffic witness stated explicitly that were he to have estimated traffic in April, rather than six months previous, his estimate would have been extremely different in consequence of stated market factors and particularly cargo declines that had taken place in the interim.*[3]

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[3] In addition, the factor cited and mischaracterized by GVI/PRMA's brief in opposition (p. 5), *e.g.*, the Reagan budget cuts, is another example of PRMSA's inability to prove in February and March, 1981 that the recession would have the devastating effect

2. If this Court intervenes only once in a decade in reminding Courts of Appeals of their duties with regard to requiring evidence *of record* to support an agency decision, this is an appropriate case for such intervention. The Commission gave three reasons for its decision: (1) comparative fuel prices of other carriers, which was conceded before the Court of Appeals to be based on the Commission's factual error;[4] (2) the concocted flaw in PRMSA's methodology, which the federal respondents

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upon PRMSA's traffic which was experienced by July and August, 1981—the months when fuel rates were known to have fallen below projected levels. GVI/PRMA wrongly tells this Court (Br., p. 5) that PRMSA's attempt to adjust its traffic forecast on the basis of the effect of the Reagan budget cuts on Puerto Rico's economy was rejected by the ALJ and by the Commission. This is not so. PRMSA's traffic forecast, like its fuel forecast, was made pre-filing, *i.e.*, in October-November, 1980. When the matter was set for investigation by the Commission, in February 1981, and PRMSA's direct case had to be presented at hearing, PRMSA made one alteration to its traffic forecast, which was an estimate of a loss of 3,000-odd units based upon its projection of the effect of the Reagan budget cuts. That projection and estimate was submitted at a time when passage of the relevant budget proposals was uncertain, and much less certain was their impact on the U.S. and highly derivative Puerto Rican economies. The ALJ held that PRMSA's estimates on the effect of the federal budget cuts on its traffic were "amorphous and preliminary" and "extremely speculative" (Pet. App. p. 169a) and consequently PRMSA had failed in its burden of proof on this issue. This holding was not appealed to the Commission. Except for one insignificant change resulting from the substitution of a smaller for a larger ship (projected at near capacity), the ALJ and the agency accepted PRMSA's traffic forecast as prepared in October-November, 1980.

[4] That "reason," a confusion of diesel and Bunker C Fuel prices, might have led the Court of Appeals to (1) question the Commission's expertise, instead of according it an extra "dollop" of deference (Pet. App., p. 14a) or (2) invoke its usual rule that when an agency cites several reasons for its decisions, one of which is wrong, remand is appropriate in order to determine whether that reason played a significant role in the ultimate determination. *Meehan* v. *Macy*, 392 F.2d 822 (D.C. Cir. 1968).

admit (F.R. Br., p. 7) is "subsumed" in the real (third) reason[5] and (3) the "dramatic changes in the world oil markets." The third is clearly the reason for the Commission's decision, as admitted by the brief for the federal respondents (p. 7). The forecast was made in November 1980; the record closed on the fuel issue on April 23, 1981; no evidence in support of the "dramatic changes" was cited by the Commission; and the only evidence cited by the Court of Appeals were the newspaper and magazine articles of October, 1980 and January-February, 1981. The only other evidence existing in the record, never cited by the Court *and expressly discredited by the Commission* (Pet. App., pp. 77a-78a), was the prognostication of GVI/PRMA's witness-on-all-matters, Dr. Suphan Andic.[6]

The federal respondents do not pretend that this "evidence," the magazine and newspaper articles, could conceivably support a finding of "dramatic changes in world oil markets." They merely characterize the Court of Appeals' reliance on it as a "factual determination" which should not invoke this Court's attention. (F.R. Br., p. 7). We respectfully submit that if such a clear case of a Court of Appeals' misuse of appellate powers in supervising the fundamental agency requirement to decide cases on evidence presented in the record does not merit this Court's attention, then there is a serious breakdown in the checks and balances of the appellate judicial system.

3. Our petition showed that the Commission's concoction of a flaw in PRMSA's methodology was sustained by the Court of Appeals by that Court's own concoction of a new statistical theory, for which it cited textbook support; no evidence of record; and of course no opportunity for a

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[5] As to the Court's supplying of its own new "evidence" to bolster the Commission's concocted flaw, see PRMSA Pet. for Cert., pp. 14-16, and *infra*, point 3, pp. 6-7.

[6] For a blistering description of Andic's methodology and credibility, on fuel and other issues, see the ALJ's decision (Pet. App., pp. 170a-173a, 194a-195a, 217a-220a).

PRMSA test of the Court's own, new methodology.[7] Our petition showed that such Court of Appeals activity merits review and reversal by this Court (PRMSA Pet. for Cert., pp. 14-16). The federal response is that the issue is "subsumed" by the major "dramatic changes" finding; they then refer to the Commission's own "methodological flaw" argument, which was different from the Court of Appeals'; and they conclude that the issue has no precedential value.[8] The federal respondents thus fail both to engage the issue or to deal with its wide-ranging significance: the fundamental misconstruction of the roles

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[7] Both the federal respondents and GVI/PRMA refer to the Court of Appeals characterization of PRMSA's fuel forecast as an 88% rise from its historic year, GVI/PRMA once again misstating facts by referring to that increase as occurring in one year (GVI/PRMA Brief in Opposition, p. 7). The percentage characterization itself is extremely misleading; and the PRMSA forecast was by no means adventuresome in its time. The "historic year" was not a year immediately preceding the test year, but was PRMSA's last fiscal year which ended in June, 1980. As the test year was March 1981-February 1982, the historic and test years spanned 32 months and the mid-points of both years were 20 months apart. While the *average* price of fuel oil in the historic year was $19.41 a barrel, it had risen to $28.04, average, for fourth quarter 1980, and by March, the first month of the test year, it was $31.14 a barrel, or almost on target with PRMSA's $32.00 projection as the average price for the three month period March-April-May 1981.

[8] GVI/PRMA purports to find support for the court's new methodological flaw argument in the Commission's criticism of GVI/PRMA's own witness, Dr. Andic. Dr. Andic had used a "straight trend line" methodology for predicting fuel prices—a methodology called "naive and simplistic" by the Commission's staff and ALJ (Pet. App., p. 219a) and explicitly rejected by the Commission (Pet. App., pp. 77a-78a and n.36). GVI/PRMA takes this Commission condemnation of Andic's straight line forecast as support for the Court's new argument that a linear least square fit regression formula which produces constant quarterly increments is statistically infirm. It was for these kinds of arguments as well as the constant distortions of facts that the ALJ repeatedly characterized GVI/PRMA's testimony and legal arguments as unreliable. See citations *supra*, n.6.

of agency and appellate court when the appellate court sustains an agency's decision for reasons never advanced by the agency, the parties, or the record.

4. Our petition correctly showed (pp. 10-12) that the Court of Appeals made a serious error in its interpretation of the Intercoastal Shipping Act in concluding that carriers, unlike shippers, have immediate rights to redress if the Commission-approved rates turn out to be inadequate. The federal respondents reply in a footnote (F.R.Br., pp. 6-7, n.5), that the point is (a) irrelevant to the court's decision; (b) supported by the Commission's decision; and (c) supported by the Commission's regulations. The federal respondents also cite a rate increase obtained by petitioners later as further evidence that the Court of Appeals correctly balanced the equities.[9] Every single one of the federal parties' points is wrong.

The Court of Appeals started its discussion with a reference to the "legal right under the statute" for cost pass-through increases if fuel prices increased (Pet. App., p. 18a) and ended its discussion with a justification of the result it reached by reference to the supposed privilege of PRMSA to increase its rates on an "expedited" basis if the freight rates allowed by the Commission are too low (Pet. App., p. 26a). The erroneous interpretation of the statute (and the Commission's regulations) thus appears the cornerstone of the Court's decision.

The Court of Appeals is dead wrong that there is authority in the statute or even in the regulations for cost pass-through increases, either for escalating fuel prices or for other cost or revenue factors. If such had been the case, PRMSA would never have had to make a fuel forecast in the first place. As is well known, the

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[9] GVI/PRMA's arguments here mirror those of the federal respondents (GVI/PRMA Brief in Opposition, pp. 6-7).

Commission cancelled its bunker surcharge authority two months prior to the filing of these increases. *Bunker Surcharges in the Domestic Offshore Trades*, 20 S.R.R. 401 (1980) (P & F). The Commission's decision *in this case* said PRMSA could increase its rates if fuel rose above its March price of $31.14, but the decision did not allow any expedited rate increases if any other factor resulted in inadequate profits.

The references allegedly supporting the statement (F. R. Br., pp. 6-7, n.5) that the Act and the regulations provide for a carrier filing "a general rate increase, supported by abbreviated data, . . . on short notice (*Id.* at 79a n.37, 234a)" are to (1) ("79a n.37 ") the decision referred to above, whereby the Commission, when *cancelling* its bunker surcharge authority, said that carriers might *ask* the Commission to *waive* statutory requirements to meet "*emergency*" fuel conditions (20 S.R.R. at 402); and (2) ("234a") the statutory language allowing the Commission to waive "in its discretion and for good cause" its 60-day notice requirements. That statutory grant is unimplemented by any regulations and the Commission has no policy whatsoever of dispensing with the requirement of filing massive amounts of data on specified forms to accomplish general rate increases of 3 percent or more. There remains no mechanism whereby carriers may swiftly respond to changing traffic and profit patterns. The Court of Appeals statement that carriers are in a better position than shippers to remedy inadequate profit levels is wrong.

The final proof offered by the federal respondents proves petitioner's point. The federal respondents point to a 13 percent rate increase allowed to go into effect for a period commencing *at the end* of the test year involved in this case as an example of carrier ability to remedy inadequate profits stemming from low rates. The federal respondents neglect to tell this Court that when PRMSA applied for a 2.9 percent increase a few weeks before the

Commission issued its decision in this case, an increase allowed by statute to become effective in 30 days, the Commission *suspended* the increase for the ensuing four-month period which represented the last months of the test year involved in this docket. *Thus the Commission itself took the position that the carriers' rates were frozen for the entire test year even in a situation (i.e., increases of less than 3 percent) where the statute and regulations permit a 30-day notice filing.* The point remains valid and unrefuted that the Court of Appeals made a serious misstatement regarding remedies available to carriers under the Intercoastal Shipping Act, a misstatement that hardly appears irrelevant in light of the result reached.

For all of the foregoing reasons, we respectfully urge that the Petition for Certiorari prayed for be granted.

Respectfully submitted,

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